

MICHAEL P. WILLIAMS, ) No. C 07-5574 MMC (PR)  
 )  
Plaintiff, )  
 )  
v. ) **ORDER DENYING DEFENDANTS’**  
 ) **MOTION TO DISMISS; DENYING**  
 ) **PLAINTIFF’S MOTION FOR**  
 ) **DISCOVERY; DIRECTIONS TO**  
SCOTT KERNAN, et al., ) **PLAINTIFF**  
 )  
Defendant. ) (Docket Nos. 41, 42 & 46)  
 )  
 )

### A. Motion to Dismiss

Defendants move to dismiss the claims against defendants Grannis and Pimental, (Docket No. 42), the individuals who are alleged to have reviewed plaintiff's prison grievances in their respective roles as Chief of Inmate Appeals for the Department of

1 Corrections and Rehabilitation, and Appeals Examiner and Facility Captain for Pelican Bay  
2 State Prison. Defendants bring such motion, pursuant to Rule 12(b)(6) of the Federal Rules  
3 of Civil Procedure, on the ground that plaintiff has no constitutional right to an  
4 administrative appeal or grievance system.

5 A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal  
6 Rules of Civil Procedure should be granted if the complaint does not proffer “enough facts to  
7 state a claim for relief that is plausible on its face.” Bell Atlantic Corp v Twombly, 127 S. Ct  
8 1955, 1974 (2007). The court “must accept as true all of the factual allegations contained in  
9 the complaint,” Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), but need not accept as true  
10 allegations that are legal conclusions, unwarranted deductions of fact or unreasonable  
11 inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988, amended, 275 F.3d  
12 1187 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the  
13 absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica  
14 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

15 In considering a motion to dismiss, the court must construe the complaint in the light  
16 most favorable to the plaintiff and accept all factual allegations as true. See Cahill v. Liberty  
17 Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Federal courts are particularly liberal in  
18 construing allegations made in pro se civil rights complaints. See Thompson v. Davis, 295  
19 F.3d 890, 895 (9th Cir. 2002). In ruling on a Rule 12(b)(6) motion, the court may not  
20 consider any material outside the complaint but may consider exhibits attached thereto. See  
21 Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 925 (9th Cir. 2001); Fed.  
22 R. Civ. P. 10(c) (treating exhibits attached to complaint as part of complaint for purposes of  
23 12(b)(6) motion).

24 An administrator may be liable for deliberate indifference to a serious medical need if,  
25 for example, he or she fails to respond to a prisoner’s request for help. See Jett v. Penner,  
26 439 F.3d 1091, 1098 (9th Cir. 2006). Here, plaintiff has alleged that Grannis and Pimental  
27 violated his First, Eighth, and Fourteenth Amendment rights when they failed to properly  
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1 investigate plaintiff's complaints that he was receiving constitutionally inadequate health  
2 care at the hands of the other defendants. By such allegation, plaintiff has pleaded, given the  
3 standard for administrative liability set forth in Jett, "enough facts to state a claim for relief  
4 that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

5 Accordingly, defendants' motion to dismiss will be denied, and defendants will be  
6 directed to file a motion for summary judgment or, alternatively, if defendants are of the  
7 opinion that this case cannot be resolved by summary judgment, to so inform the Court prior  
8 to the date the summary judgment motion is due.

9 **B. Motion to Compel**

10 Plaintiff has filed a motion to compel discovery (Docket No. 46). To date, however,  
11 the majority of defendants remain unserved, Grannis and Pimental being the sole exceptions.

12 Accordingly, as to the unserved defendants, plaintiff's motion for discovery will be  
13 denied without prejudice as premature. As to Grannis and Pimental, the motion likewise will  
14 be denied without prejudice, as there is no indication that plaintiff has fulfilled the meet and  
15 confer requirement under Federal Rule of Civil Procedure 37(a)(2)(A).

16 **C. Unserved Defendants**

17 As noted above, no defendants other than Grannis and Pimental have been served. In  
18 particular, defendants Flowers, Risenhoover, Sayre, Kravitz, and McLean remain unserved.  
19 (See Docket Nos. 31–35.)

20 In cases wherein the plaintiff proceeds in forma pauperis, the "officers of the court  
21 shall issue and serve all process." 28 U.S.C. § 1915(d). The Court must appoint the Marshal  
22 to effect service, see Fed. R. Civ. P. 4(c)(2), and the Marshal, upon order of the Court, must  
23 serve the summons and the complaint, see Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir.  
24 1994). Although a plaintiff who is incarcerated and proceeding in forma pauperis may rely  
25 on service by the Marshal, such plaintiff "may not remain silent and do nothing to effectuate  
26 such service"; rather, "[a]t a minimum, a plaintiff should request service upon the appropriate  
27 defendant and attempt to remedy any apparent defects of which [he] has knowledge."  
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1 Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

2 Here, plaintiff's complaint has been pending for over 120 days, and, consequently,  
3 absent a showing of "good cause," is subject to dismissal without prejudice as to the  
4 unserved defendants. See Fed. R. Civ. P. 4(m). Because plaintiff has not provided sufficient  
5 information to allow the Marshal to locate and serve the above-referenced additional five  
6 defendants, plaintiff must remedy the situation or face dismissal of his claims against them.  
7 See Walker, 14 F.3d at 1421–22 (holding prisoner failed to show cause why prison official  
8 should not be dismissed under Rule 4(m) where prisoner failed to show he had provided  
9 Marshal with sufficient information to effectuate service).

10 Accordingly, plaintiff must either himself serve the unserved defendants with the  
11 summons and complaint, or provide the Court with an accurate current location such that the  
12 Marshal is able to serve such defendants. If plaintiff fails to effectuate service, or provide the  
13 Court with an accurate current location for such defendants, within thirty days of the date this  
14 order is filed, plaintiff's claims against the unserved defendants will be dismissed without  
15 prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

## 16 CONCLUSION

17 For the foregoing reasons, the Court orders as follows:

18 1. Defendants' motion to dismiss is hereby DENIED. (Docket Nos. 41 & 42.)

19 2. Within sixty (60) days of the date this order is filed, defendants shall file a motion  
20 for summary judgment with respect to the above-referenced cognizable claim.

21 a. Any motion for summary judgment shall be supported by adequate factual  
22 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
23 Procedure.

24 b. Plaintiff's opposition to the motion for summary judgment shall be filed  
25 with the Court and served on defendants no later than thirty (30) days from the date  
26 defendants' motion is filed.

27 The Ninth Circuit has held that the following notice should be given to plaintiffs:  
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1 The defendants have made a motion for summary judgment by which  
2 they seek to have your case dismissed. A motion for summary judgment under  
Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

3 Rule 56 tells you what you must do in order to oppose a motion for  
4 summary judgment. Generally, summary judgment must be granted when there  
5 is no genuine issue of material fact--that is, if there is no real dispute about any  
6 fact that would affect the result of your case, the party who asked for summary  
7 judgment is entitled to judgment as a matter of law, which will end your case.  
8 When a party you are suing makes a motion for summary judgment that is  
9 properly supported by declarations (or other sworn testimony), you cannot  
10 simply rely on what your complaint says. Instead, you must set out specific  
facts in declarations, depositions, answers to interrogatories, or authenticated  
documents, as provided in Rule 56(e), that contradict the facts shown in the  
defendants' declarations and documents and show that there is a genuine issue  
of material fact for trial. If you do not submit your own evidence in opposition,  
summary judgment, if appropriate, may be entered against you. If summary  
judgment is granted in favor of defendants, your case will be dismissed and  
there will be no trial.

11 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
12 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.  
13 317 (1986) (holding party opposing summary judgment must come forward with evidence  
14 showing triable issues of material fact on every essential element of his claim). Plaintiff is  
15 cautioned that failure to file an opposition to defendants' motion for summary judgment may  
16 be deemed to be a consent by plaintiff to the granting of the motion, and granting of  
17 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.  
18 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

19 c. Defendants shall file a reply brief no later than fifteen (15) days after  
20 plaintiff's opposition is filed.

21 d. The motion shall be deemed submitted as of the date the reply brief is due.  
22 No hearing will be held on the motion unless the Court so orders at a later date.

23 3. Plaintiff's motion to compel is hereby DENIED. (Docket No. 46.)

24 4. Within thirty (30) days of the date this order is filed, plaintiff shall either himself  
25 serve the unserved defendants with the summons and complaint, or provide the Court with an  
26 accurate current location such that the Marshal is able to serve said defendants.

1 This order terminates Docket Nos. 41, 42 & 46.<sup>1</sup>

2 **IT IS SO ORDERED.**

3 DATED: March 1, 2010

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5 MAXINE M. CHESNEY  
6 United States District Judge  
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28 <sup>1</sup> Docket No. 41 was superseded by Docket No. 42.